No. 89-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROGER BURRELL,
Petitioner,
vs.
CITY OF LOS ANGELES, et al.,
Respondents.

LOS ANGELES CITY EMPLOYEES UNION, et al.,
Petitioners,
vs.
BOARD OF CIVIL SERVICE COMMISSIONERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Where an independent civil service disciplinary tribunal has found, after a full and fair hearing, that (a) an appointing authority has established the facts alleged to justify an employee's discipline, (b) the penalty imposed is not irrational, and (c) the appointing authority who imposed the penalty is not actually biased against the employee, does the federal Constitution require a further hearing on the magnitude of the penalty imposed?

2. May a civil service manager, who is not actually biased against the interests of a subordinate employee, constitutionally initiate civil service discipline against the employee and, assuming the facts justifying discipline are proven, set and impose a rational penalty?

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STATEMENT OF THE CASE

California's Court of Appeal opinion, which petitioners are asking this Court to review, resulted from the consolidation of two separate appeals.

In *Roger Burrell v. City of Los Angeles, et al.* ("Burrell"), the City of Los Angeles ("City"), Douglas S.

Ford, and the City's Board of Civil Service Commissioners ("Board") appealed from the judgment of the Superior Court of Los Angeles County entered April 20, 1987 granting a peremptory writ of mandate under California Code of Civil Procedure §1085 and holding unconstitutional a portion of Los Angeles City Charter §112 ("Charter §112").

In *Los Angeles City Employees Union, et al. v. Board of Civil Service Commissioners, etc., et al.* ("LACEU"), the Board, the City, and James E. Hadaway appealed from the judgment of the Superior Court of Los Angeles County entered May 15, 1987 declaring unconstitutional a portion of Charter §112 and ordering the issuance of a peremptory writ of mandate under California Code of Civil Procedure §1094.5.

The California Court of Appeal reversed both judgments and denied rehearing. The California Supreme Court denied a petition for hearing.

These appeals both concern an attack on a portion of Charter §112, the Los Angeles City Charter provision which initiates the post-deprivation procedure established by the City and the State of California to review administrative discipline imposed on all City civil service employees other than sworn police officers and firefighters.[1]

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[1] Los Angeles City Charter §112 reads as follows:

"Sec. 112. (a) Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power

(continued)

Charter §112 provides that civil service terminations and suspensions may occur only for cause. Such

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(ftn. continued)

to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The board with the consent of the appointing authority may also order a reduction in the length of the suspension, or substitution of a suspension for a removal or discharge, if the board finds, in writing, that such action is warranted. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or

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discipline takes effect upon the filing with the City's Board of Civil Service Commissioners of a written certification that the reasons for an adverse action have been served in writing upon the concerned employee. Within a prescribed time of the effective date of the discipline, both the Board and the employee have the right to request an investigation of "the grounds stated for such removal, discharge or suspension." Upon completion of the investigation, the Board is given two options:

> (1) If the Board finds that the grounds stated for the discipline were insufficient or were not sustained, and also finds that the employee is a "fit and suitable person to fill the position" in which he was disciplined, the Board must order that the employee be reinstated or restored to duty.
>
> (2) If the Board finds that the grounds stated for the discipline were sufficient and sustained, the Board may still order a reduction in the length of any suspension, or the substitution of a suspension for a termination, but only if the appointing authority of the employee's operating department or office consents to such a reduction or substitution.

It is the latter option — the necessity for consent of the appointing authority before penalty modification

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(ftn. continued)

suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

where the grounds for discipline were independently found to be sufficient and sustained — which the petitioners in these cases seek to attack. The petitioners erroneously maintain that the City's appointing authorities hold an unconstitutional "veto power" over the Board and, ultimately, a power of review over the same discipline decision the appointing authority originally made. Pet. at 11. Petitioners take the position that the City must provide a post-disciplinary appeal which gives the Board itself full power not only to decide whether the grounds stated for the discipline have been established and are sufficient to justify punishment, but also to set — without limitation — an appropriate penalty.

Petitioners have materially mischaracterized the City's discipline review process and are attempting to apply legal principles which do not support the positions for which they are advanced. The court of appeal opinion whose review is sought is well-researched; it accurately collects and summarizes the relevant federal and California authorities, and it assists public employers throughout California. The opinion logically flows from a consistent body of federal appellate authority. California's courts have, as the court of appeal opinion reflects, applied federal authority accurately and uniformly. For these reasons, review by this Court is not merited, and certiorari should be denied.

It is the City's position that no authority holds that an employer is required constitutionally to establish a civil service discipline appeal process in which an independent board or other entity has full power both to adjudicate the factual basis for a disciplinary action and to set the level of appropriate penalty. On the contrary, what is constitutionally required is, first, a predeprivation process in which an employee is notified of a proposed disciplinary action, is provided with a factual basis for

the proposed disciplinary action, and is given a meaningful opportunity to state his side of the dispute. *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Skelly v. State Personnel Bd.*, 15 Cal.3d 94, 124 Cal.Rptr. 14, 539 P.2d 774 (1975). Either pre- or post-discipline, the employee is futher entitled to a process, either through local or state law, which allows him a full opportunity to sift through the evidence and to question the factual basis for the discipline imposed. See generally, Pet. App. A, at A9 and A15; *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Although the final decision on the facts and the penalty must, of course, be made by an unbiased decisionmaker, and a penalty may be overturned if bias is present, the burden is on the employee to prove that actual bias was present in his case. Pet., App. A, at A15; *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975).

The City's system, embodied in Charter §112, allows the Board to strike any penalty which it finds to be an abuse of an appointing authority's discretion. If the Board finds that the facts alleged in support of discipline are sustained, but that those facts are not sufficient to support the penalty which the appointing authority has imposed, the Board is required to restore the employee to his former position, with or without the appointing authority's consent. The Board may not, of course, overturn a penalty as to the propriety of which reasonable minds could differ. But if the imposed penalty exceeds the bounds of reason, the Board is obliged to reverse it. This system is consistent with the authority of the California courts to review administrative discipline under state statute. California Code of Civil

Procedure §1094.5; *e.g., Nightingale v. State Personnel Bd.*, 7 Cal.3d 507, 515, 102 Cal.Rptr. 758, 498 P.2d 1006 (1972).

The City further maintains that its appointing authorities have no "veto power" over the Board, since under Charter §112 the Board has no power unilaterally to set a penalty once facts supporting discipline have been shown to the Board's satisfaction. The appointing authority is not, therefore, required to review his own original decision, since he is not obliged, constitutionally or statutorily, to review anything. Petitioners' claims to the contrary, Pet. at 11 and 13, are erroneous and are not supported by the City Charter or by other authority in the record.

Charter §112 provides that, where the facts supporting discipline have been shown, the final decision on penalty in nonsworn civil service disciplinary appeal cases rests with the appointing authority — usually the head of the employee's department. The appointing authority bases his original penalty decision upon facts which are ultimately established by the Board.

The appointing authority may be a governing board or an individual, and is often the person or board who approved the initiation of the disciplinary process. In spite of their occasional involvement in the initiation of discipline, appointing authorities are not, under established law, necessarily biased against the positions advanced by those employees who challenge discipline. "It is presumed that official duty has been regularly performed." California Evidence Code §664.

Numerous decisions hold, and the California Court of Appeal recognized, that to overturn discipline in an individual case, a much more substantial showing of bias is required than a mere initiation or approval of disciplinary charges. Pet., App. A, at A12-A13. For plaintiffs

to succeed in demonstrating bias in an individual case, they would need to show such a connection between a decisionmaker and the facts in dispute as to seriously call into question the decisionmaker's detached judgment. *E.g., Brasslett v. Cota*, 761 F.2d 827 (lst Cir. 1985). Cases in which bias has been found consistently involve political or pecuniary motivations causing the decisionmaker to be less than forthright in evaluating an employee's contentions. *Id.*; see generally, Pet., App. A, at A13-A15. Absent such a showing, bias cannot be demonstrated in an individual case. Obviously, such bias can never be shown through speculation about what an appointing authority might do in the future.

Neither of the trial courts made any findings of individual bias in these cases. Such findings could not have been made, since the complaining parties below failed to show in their papers or argument that either of their general managers had any personal animosity toward them, or had any personal stake in the outcome of their disciplinary appeals. Further, neither complaining party showed below that allowing a department manager or governing board to be the final arbiter of discipline within a department necessarily results in a biased or otherwise unfair evaluation of a disciplinary appeal. Indeed, the City contends, absent an affirmative showing of bias from the conduct of a manager or from the relationship of that manager to the facts, the final setting of penalty by a department head is a rational system which allows the persons accountable for the effective operation of public organizations to supervise and control the performance of those who assist them in carrying out the public's business.[2]

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[2] Numerous jurisdictions utilize employee discipline systems similar to the one used in Los Angeles. The City and County of San

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Petitioners in these cases seek to deprive the City's appointing authorities of their charter-mandated power to set nonsworn civil service penalties, and seek to transfer that power to the Board of Civil Service Commissioners. This power was never granted to the Board by the City's voters or by any legislative act. The transfer of power would apply to all future discipline cases, but it was not constitutionally required even as to the individual employees now before the Court. For these reasons, the City asks this Court to deny the requested writ of certiorari, and to allow the judgments below to stand.

(ftn. continued)
Francisco's scheme, for example, allows no independent review of the magnitude of administrative suspensions of thirty days or less. Charter of the City and County of San Francisco, §8.342, Cal. Stats. 1971, Ch. 273, at 4739.

REASONS FOR DENYING THE WRIT

1. PETITIONERS HAVE MISCHARACTERISED THE CITY'S CIVIL SERVICE DISCIPLINE REVIEW SYSTEM

a. Neither the Federal nor the California Constitution Requires an Employer to Provide an Independent Penalty Review, So Long as the Ultimate Decisionmaker is Not Guility of Actual Bias and the Penalty Result is Not Arbitrary.

Petitioners contend that due process will not tolerate a system in which a constitutionally or statutorily mandated review of a civil service penalty decision is conducted by the original decisionmaker. Petitioners mistakenly assert that the City maintains a system in which appointing authorities are statutorily required to review and evaluate their own previous civil service penalty decisions. This erroneous characterization of the City's statutes has led the petitioners to cite case authority which does not address the issues on which this litigation turns.

Petitioners may be correct that traditional notions of due process will not tolerate a system in which a constitutionally mandated independent review of a civil service penalty decision is conducted by the original decisionmaker. *See Withrow v. Larkin, supra*, 421 U.S. at 58 n. 25, 95 S.Ct. at 1470 n. 25, 43 L.Ed.2d at 730 n. 25.

What eludes petitioners is (1) that civil service appellants enjoy no constitutionaly mandated right to an independent review of penalty decisions, and (2) that no review of the original penalty decision is conducted by the City's decisionmakers. What is constitutionally required, and what the City's system provides, is that the person rendering the ultimate decision on penalty not be guilty of actual bias, and that the penalty not be arbitrary or capricious, or otherwise an abuse of discretion. Pet., App. A, at A15.

Independent review of the penalty decision may well be constitutionally required, but only to the extent necessary to determine whether actual bias exists in the decisionmaker and to ensure that a factual basis exists for the penalty. *Id.* The California Court of Appeal has stated, and petitioners have been unable to accept, that neither the federal nor the California constitution requires that an independent body be provided to supply a *de novo* examination of the factors contributing to the magnitude of the imposed penalty. *Id.* at A15, A20-A21.

As the California Court of Appeal observed, Los Angeles City Charter §112 satisfies all state and federal due process requirements. Pet., App. A, at A21. An independent review tribunal, the City's Board of Civil Service Commissioners, is empowered to determine whether a factual basis exists for the penalty previously imposed. The Board is empowered to nullify the penalty if it determines after hearing that the factual grounds stated for discipline were insufficient or were not sustained. The disciplined employee is permitted at the hearing to advance any evidence he may have that the decisionmaker was motivated by actual bias toward the employee, or that the penalty imposed was so severe as to defy reason. Beyond this review for arbitrariness and actual bias, the Board is empowered only to suggest to

the appointing authority that the penalty previously chosen should be reduced. The entire administrative review process supplied by the City is subject to further review in the California state courts. California Code of Civil Procedure §1094.5.

Petitioners contend that an independent employer review of the magnitude of a civil service discipline penalty is constitutionally required. No reported decision so holds. Instead, petitioners analogize the conclusion they seek from holdings in criminal parole revocation hearings and similar proceedings, such as in *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977), and in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Unfortunately for petitioner's argument, the issue in a parole hearing is whether the specific penalty of revocation is factually supported. Conversely, the issue presented to this Court is, assuming the facts support some level of discipline, whether an independent hearing on the magnitude of penalty is then constitutionally required.

b. Contrary to the Petitioners' Assertion, an Appointing Authority Under the City's Discipline Review System is Not Statutorily Required to Review and Evaluate His Own Prior Decisions.

Citing *Withrow v. Larkin, supra*, petitioners maintain that the federal Due Process Clause will not countenance a civil service discipline review system in which a decisionmaker is required to review and evaluate his own prior decisions. A portion of *Withrow*, cited in the

Petition at 13-14, constitutes *dicta*; the respondents are prepared, however, to accept the proposition that if the Constitution compels an independent review of the magnitude of a penalty, or if a statute requires that such an independent review occur, then the required independent review would not be present if a decisionmaker were compelled to review and evaluate his own prior decision. As set out in the previous section, however, neither the federal nor the California constitution requires an independent review of a civil service penalty decision. Further, as set out below, the penalty determination system mandated by Los Angeles City Charter §112 does not require appointing authorities to review and evaluate their own prior decisions.

Under Charter §112, the penalty decision of the appointing authority is final, unless the Board of Civil Service Commissioners finds no factual basis for the decision, or unless the Board can convince the appointing authority to reduce it. At no point in the City's discipline review system is an appointing authority required to adjudicate, or otherwise required to review, his own previous determination. The original penalty determination, once made, is final and is not technically subject to review by anyone unless the Board finds in writing that no factual basis exists to support it.

If factual support does exist for the penalty imposed, the appointing authority may reduce the level of discipline, but he is not required statutorily to grant any consideration to a penalty reduction request. Absent a requirement that the appointing authority sit in judgment over his own previous decision, the *Withrow v. Larkin dicta* is not applicable to the City system or to the cases now before the Court.

The California courts have, as set out in the California Court of Appeal opinion, interpreted Charter §112 in

conformity with the views expressed by the City above. Pet., App. A, at A20-A21. This petition asks this Court to countermand the California judiciary's reading of Charter §112, and then to hold the resulting statute unconstitutional. This transparent attempt must be rejected.

CONCLUSION

For all of the above reasons, it is clear that the decisions of the federal courts, on the issues presented, are harmonious and uniform. The questions of federal law presented are, as noted by California's Court of Appeal, well-settled. This petition asks the Court to interpret a California statute in a manner inconsistent with the reading given it by the California courts. Since the California courts have accurately applied federal doctrine to the issues presented, respondents request that the Petition for Writ of Certiorari be denied.

December 15, 1989

Respectfully submitted,

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vs.
CITY OF LOS ANGELES, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Esiquia Gonzales, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

CECIL WILLIAM MARR
MARR & MARCHANT
A Law Corporation
3255 Wilshire Blvd., Suite 830
Los Angeles, CA 90010

That affiant makes this service, for ROBERT CRAMER, Counsel of Record, CITY OF LOS ANGELES, Attorneys for Respondents herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Esiquia Gonzales

On December 15, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Esiquia Gonzales, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore Matsuo Wilden
Notary Public in and for
said county and state